

Tang (Migration) [2023] AATA 1244 (13 February 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms Shufeng Tang
REPRESENTATIVE:	Mr Hua He (MARN: 1572790)
CASE NUMBER:	2212418
HOME AFFAIRS REFERENCE(S):	BCC2019/3547267
MEMBER:	Cheryl Cartwright
DATE:	13 February 2023
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl 820.211(2)(a) of Schedule 2 to the Regulations • cl 820.221 of Schedule 2 to the Regulations

Statement made on 13 February 2023 at 11:48am

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine spousal relationship – evidence of events subsequent to the date of the visa application – financial aspects – social aspects – nature of the household – nature of the commitment – decision under review remitted

1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

Jayasinghe v MIMA [2006] FCA 1700

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
3. The applicant applied for the visa on 16 August 2019 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl 820.211(2)(a) because insufficient evidence had been provided to demonstrate that the applicant was the spouse or de facto partner of the sponsor, as defined under section 5F and 5CB of the Migration Act.
5. The applicant appeared before the Tribunal on 10 February 2022 to give evidence and present arguments.
6. The Tribunal exercised its discretion to hold the hearing by video conference, having regard to the nature of the matters that were required to be considered and the individual circumstances of the applicant. The Tribunal also had regard to the Tribunal's objective of providing a mechanism of review that is fair, just, economical and quick, and the delay to the matter if the hearing was not to be conducted by video conference. The Tribunal is satisfied that the applicant was given a fair opportunity to give evidence and present arguments.
7. The Tribunal also received oral evidence from Mr Peter Bagehorn, the sponsor. The hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
8. The applicant was represented in relation to the review.
9. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

10. The issue in the present case is whether, at the time of application on 16 August 2019, the applicant and the sponsor were spouses for the purposes of the Act.
11. As Middleton J stated in *Jayasinghe v MIMA* [2006] FCA 1700 at [35]:
 12. Evidence of events subsequent to the visa application is relevant if it 'tends logically to show the existence or non-existence of facts relevant to the issue to be determined': see *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 4 ALD 139 at 160 per Deane J. The Tribunal must consider all relevant evidence, which may include evidence of events subsequent to the date of application insofar as it assists in the task of determining whether the appellant and the sponsor were in a marriage relationship at the time of the application. The question of whether particular evidence is relevant and the weight it is to be given is clearly a matter for the Tribunal.

13. In deciding this matter, the Tribunal has also had regard to evidence of events subsequent to the date of the visa application.
14. In the circumstances of this case, the Tribunal considers that it is appropriate to make findings about cl 820.221 (a time of decision criterion) as well.

15. **Background**

16. The parties met through an online dating site in September 2018 and arranged to meet in person a month later. The parties met a second time during October 2018 and the applicant returned to China in November 2018. They remained in touch via social media and the applicant returned to Australia and moved into the sponsor's home to live with the sponsor and his mother in February 2019. The parties married on 10 May 2019.
17. The applicant formed a close relationship with the sponsor's elderly mother. The applicant helped the sponsor to take care of his mother until she died in November 2020.
18. In March 2021 the sponsor had a stroke which affected his left arm and leg and rendered him unable to work. The applicant now takes care of the sponsor whose health has improved since the stroke.

Whether the parties are in a spouse or de facto relationship

19. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen. A copy of the sponsor's family's citizenship certificate is on the Department's file.
20. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) is effectively a question which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

21. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship.
22. The parties were married in Paynesville, Victoria, on 10 May 2019. A copy of the marriage certificate is on the Department's file. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Are the other requirements for a spouse relationship met?

23. Regulation 1.15A(3) provides relevant factors for determining whether the spousal relationship exists. These factors are (a) the financial aspects of the relationship; (b) the nature of the household; (c) the social aspects of the relationship; and (d) the nature of the persons' commitment to each other.
24. In considering these issues, the Tribunal has had regard to all the documents on the Department's file and the Tribunal's file.
25. *The financial aspects of the relationship*
26. Any joint ownership of real estate or other major assets, any joint liabilities, the extent of any pooling of financial resources, whether one person in the relationship owes any legal obligation in respect of the other and the basis of any sharing of day-to-day household expenses are relevant factors to consider when assessing the financial aspects of the relationship.
27. There is no evidence before the Tribunal that the parties jointly own real estate or have any joint liabilities or that one person in the relationship owes any legal obligation in respect of the other.
28. In independent and consistent statements, the parties told the Tribunal hearing that the sponsor owns the house they live in because it was left to him in his mother's Will. The registered ownership name is yet to be changed because the sponsor has been ill, but the process of changing the name is underway.
29. With regard to management of financial aspects of the relationship, in independent and consistent statements, the parties told the Tribunal that they had moved into the sponsor's mother's house soon after they were married and the sponsor's mother covered most expenses. The sponsor also received Centrelink assistance as a carer for his mother.
30. The Tribunal notes the lack of documentation regarding the sharing of finances at the time of application and gives little weight to this lack of documentation.
31. In a statement dated 6 February 2023 provided to the Tribunal, the sponsor stated that the parties had not arranged to have a joint account when they were first married because they were busy moving to his mother's home. This was a move from Melbourne to Paynesville. He stated that, during this time, he provided the applicant with his own card for shopping for household items.
32. In this statement the sponsor stated that he had been dissatisfied with the account arrangements when he established a joint account and was in the process of changing accounts when his mother died. Not long after that, he had a stroke. As his health improved, the parties established a joint bank account and a copy of a statement for this account for September 2022 to December 2022 was provided to the Tribunal. As this account was established only for presentation to the Tribunal, the Tribunal gives it little weight.
33. The Tribunal notes that, in independent and consistent evidence to the hearing, the parties stated that they undertook shopping together, taking the sponsor's mother with them when she was alive and, even without a joint account, they shared responsibility for household purchases. The Tribunal gives great weight to the evidence provided to the hearing.

34. *The social aspects of the relationship*

35. Whether the persons represent themselves to other people as being married to each other, the opinion of the persons' friends and acquaintances about the nature of the relationship and any basis on which the persons plan and undertake joint social activities are relevant matters to be considered in determining the social aspects of the relationship.
36. The Tribunal notes the labelled and dated photographs provided by the parties demonstrating dining with friends and spending time with the sponsor's mother before she died and gives some weight to the photographs.
37. In her statutory declaration dated 9 July 2019, the applicant stated that the parties socialised with the sponsor's friends who "were all friendly to me".
38. In independent and consistent statements, the parties told the hearing that they did not socialise often because of their responsibility for taking care of the sponsor's mother. The sponsor said, "it was hard going out because we couldn't leave her alone in the house for long". The Tribunal notes the parties' restriction on socialising and gives some weight to this restriction.
39. In a statutory declaration dated 15 May 2021 by Mr Peter Robert Andrew Rackley, a friend of the sponsor, Mr Rackley stated that he was the sponsor's best man at the parties' wedding on 10 May 2019. He stated that it was a "very special day for all of us". He stated that the applicant took great care of the sponsor's mother and he has socialised with the parties on several occasions, and visited their home.
40. In an undated statement received by the Tribunal on 2 September 2022, Mr Iosif Irimia stated that he and his wife had moved to Paynesville and "had the good fortune" to meet the parties. He stated that, as his wife and the applicant are both from China, the engagement has assisted in the women's adjustment to living in Australia.
41. In an undated statement received by the Tribunal on 2 September 2022, Mrs Roslyn Jensen stated that, as a close friend of the sponsor's mother, she was pleased to see the applicant move in with the sponsor to his mother's home and take care of her. The sponsor's mother had told Mrs Jensen that the applicant was so helpful that the parties had been able to cancel her external assistance and the sponsor's mother was grateful for the applicant's care.
42. In a statement dated 6 February 2023, Mr Dale George Stevenson stated that he has known the parties for three years and has observed the applicant take great care of the sponsor after his stroke.
43. The Tribunal notes the delegate's comments about "limited evidence" provided in regard to the social aspects of the relationship and gives little weight to this "limited evidence".
44. The Tribunal notes the statements and statutory declaration provided to the Tribunal and the evidence provided at the hearing and gives great weight to this evidence as demonstrating that the parties represent themselves to other people as being married and that in the opinion of their friends and acquaintances they are in a genuine spousal relationship.

45. *The nature of the household*

46. Any joint responsibility for the care and support of children, the living arrangements of the persons and any sharing of the responsibility for housework are relevant matters to be considered when assessing the nature of the household.

47. There is no evidence before the Tribunal that the parties have any children together. The applicant has a daughter from a previous relationship. Her daughter does not live with the parties.
48. Given the sponsor's health issues, the applicant takes care of all household duties. The applicant told the hearing that, before the sponsor's stroke, when he was well, he would cook for her daughter when she visited.
49. In his undated statement mentioned above, Mr Irimia stated that the applicant takes care of all household duties, with a focus on managing the sponsor's chronic health problems.
50. The Tribunal notes the statement by Mrs Jensen mentioned above in which she states that the parties were able to cancel external services for the home because of the extra work and care being undertaken by the applicant.
51. The Tribunal notes the delegate's comments that, while the parties had provided evidence that they lived at the same address, the delegate found that this evidence did not demonstrate that they lived together in a spousal relationship. The Tribunal gives some weight to the evidence provided at the time of application that the parties were living together in a genuine spousal relationship.
52. The Tribunal gives great weight to the evidence provided to it that the parties share responsibilities for the household and that they are in a genuine spousal relationship.

53. *The nature of the persons' commitment to each other*

54. The duration of the relationship, the length of time during which the persons have lived together, the degree of companionship and emotional support that the persons draw from each other, and whether the persons see their relationship as long-term are all aspects to be considered in determining the nature of the persons' commitment to each other.
55. The Tribunal notes the limited evidence provided to the Department at the time of application and gives some weight to this evidence.
56. The Tribunal notes that, at the time of application on 16 August 2019 the parties had been married for three months and at the time of this decision the parties have been married for almost four years and gives some weight to this length of time.
57. When asked by the Tribunal why they had married only three months after the applicant had returned from a trip to China, the applicant noted that the wedding date was almost six months after they had first met and told the Tribunal that they wanted to be married when living with the sponsor's mother. When the Tribunal asked the sponsor the same question he said, "I didn't want her to get away".
58. In independent and consistent statements, the parties told the Tribunal that the applicant had helped the sponsor to take care of his mother and had taken over her more personal needs. Not long after the sponsor's mother had died, the sponsor had a stroke and the applicant had then taken care of him.
59. When the sponsor was in hospital in Melbourne after his stroke, the applicant had moved to Melbourne to stay with her daughter so that she could visit him every day.
60. The applicant told the Tribunal that government assistance was limited because the house did not meet government size requirements, particularly for the bathroom, so she was undertaking all his care requirements.

61. She told the Tribunal that, when they were first married, they'd had "a lot of sweet days" and since his illness they had grown closer. She had told him "I am devoted to you" and that she would continue to care for him. She told the Tribunal that the sponsor was touched by and grateful for her care and had become "teary" on many occasions.
62. The sponsor told the Tribunal that he appreciates having the applicant in his life. If the applicant is sad he takes her for a walk in their garden and he tries to be helpful.
63. In her undated statement mentioned above, Mrs Jensen stated that the applicant was very close to the sponsor's mother and experienced "profound grief" when the sponsor's mother died. Mrs Jensen stated that the applicant had then taken great care of the sponsor after he had suffered a stroke and stated that "without her, Peter would have definitely been forced to live in a nursing home".
64. In his statutory declaration dated 15 May 2021 mentioned above, Mr Rackley stated that the death of the sponsor's mother had caused great sadness but had brought the parties closer.
65. The sponsor told the Tribunal hearing that the parties want to "grow old and grey" together. He stated that the applicant had "fitted in well" with the local community and "is loved by the neighbours" and, as a couple, they want to make a contribution to the community.
66. The Tribunal gives great weight to the evidence provided to the hearing by the parties and, particularly, the statements provided by Mr Rackley and Mrs Jensen as evidence of the companionship and support the parties provide to each other and that they see the relationship as long term.

67. Conclusion

68. After considering all the evidence provided to it, the Tribunal is satisfied that, at the time of application and at the time of this decision, the parties were and are in a committed spousal relationship.
69. As stated above, the Tribunal is satisfied that the parties are validly married, as required by s 5F(2)(a) of the Act.
70. After considering all the evidence before it and for the reasons given with respect to the reg 1.15A(3) matters, the Tribunal is satisfied that, both at the time of application on 28 June 2016 and at the time of this decision, the applicant and the sponsor:
 - had and have a mutual commitment to a shared life as wife and husband to the exclusion of all others, as required by s 5F(2)(b) of the Act;
 - had and have a genuine and continuing relationship, as required by s 5F(2)(c) of the Act; and
 - lived and live together as much as possible as required by s 5F(2)(d)(i) of the Act.
71. Given these findings, the Tribunal is satisfied that, at the time the visa application was made and at the time of this decision, the parties were and are in a genuine spousal relationship. Therefore, the visa applicant meets cls 820.211(2)(a) and 820.221.
72. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

73. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
- cl 820.211(2)(a) of Schedule 2 to the Regulations
 - cl 820.221 of Schedule 2 to the Regulations

Cheryl Cartwright
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).